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JAMES D.

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad & Navigation Company, *Appellant*,
vs.
The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Statement of the Case.

January 28, 1916, appellant brought this suit in the Court of Claims, to recover certain balances, amounting to $4,600.67, due it for the transportation for the United States of certain weights of household goods and other personal property, known as the "regulation change of station allowance", all of which were the private property of certain army officers and other Government officials, and which had been transported by said carriers pursuant to certain bills of lading issued by the Quartermasters department of the Army.

The form of bill of lading used was that known as the "Government bill of lading", approved by the Comptroller of the Treasury in 1907, a copy of which is set out in Finding of Fact V of the Court of Claims

(Rec., 9-12), and which in terms is applicable only to the transportation of "public property".

Of the 176 items of transportation involved, 154 were for the transportation of Army officers' effects on permanent change of station, 10 for the Marine Corps, 11 for the Navy, and 11 for miscellaneous branches of the public service. (Rec., p. 15.)

At the time referred to herein the amounts of officers' private property authorized by the Army Regulations to be transported at public expense ranged from 15,000 lbs. for a lieutenant general to 6,000 lbs. for a captain, with further graduations for officers of lower rank. In addition, the professional books of Army officers and a certain number of private mounts were authorized to be transported at public expense. Similar regulations obtained in the other Government departments. (Rec., p. 8.)

For the aforesaid transportation appellant, as last carrier, billed the Government at tariff rates, as called for in said bills of lading, less the deductions on account of land-grant distance required to be made by the railroad land-grant laws and the railroad land-grant equalization agreements where troops or property of the United States was transported, and its said bills were settled by the Government on that basis. (Rec., p. 12.)

Claimant was *not* a land-grant road, but was a party to the land-grant equalization agreements. (Rec., p. 15.)

The balances sought to be recovered in this suit are the amounts deducted by claimant on account of land-grant distance, as aforesaid. The transportation involved covered the period between January 7, 1910, and January 5, 1915, but only balances due on transportation services rendered within six years of the filing of the petition were claimed.

At the time these accounts were rendered and paid, it was well known to everybody concerned, including claimant, that it would be useless for the carriers to render their bills for transportation of this kind at full tariff rates without land-grant deductions. (Rec., pp. 21, 23, 25.)

It was not claimed or shown, or found by the Court of Claims, that the Government was in anywise prejudiced by the action of the claimant in rendering its bills at land-grant rates as aforesaid.

The Court of Claims, while holding that the railroad land-grant and Army Appropriations Acts did not authorize or require reduced rates to be given by the railroads on this class of transportation, nevertheless held that appellant was estopped from bringing suit in the Court of Claims to recover the balances referred to and dismissed the petition, although the suit was filed within six years from the time the transportation services involved were rendered. From said judgment claimant appealed to this court.

Findings of Fact made by Court of Claims.

The Court of Claims made certain findings of fact (Rec., pp. 7-18), which included those above stated, with the exception that the fact that it would have been useless for the appellant to have presented its accounts for the transportation at full tariff rates is not stated in its findings of fact although it is stated in the opinion of the court (Rec., pp. 21, 23, 25).

The court refused to make other findings requested by the plaintiff and overruled claimant's motion for amended and additional findings. (See Stipulation

filed in this court November 15, 1920, and printed as an Appendix to this Brief, p. 33, *et seq.*)

Additional Findings of Fact Requested by Claimant.

The judgment of the Court of Claims is to the effect that the claimant, as last carrier, having rendered its accounts to the United States for the transportation referred to herein at land-grant rates, and having been paid by the United States for such transportation at said rates, is estopped by reason of such facts from suit in the Court of Claims to recover the amount deducted by claimant on account of land-grant, although (as held by that court in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Cl. 412, decided February 8, 1915) the property transported was not property of the United States, but private property, and the United States was not entitled to have it transported at less than full commercial rates under the Railroad Land-Grant Acts.

To avoid this plea of estoppel, the claimant adduced certain evidence going to show that the settlement of claimant's accounts by the Department were not regarded as absolutely final and conclusive between the parties, but subject to be reopened later, as the facts and the law warranted. The Court of Claims having failed to cover these points in its findings, although requested so to do, claimant requested certain additional findings of fact setting forth this understanding, between the carriers and the auditing officers of the Government, growing out of the practice. (See Stipulations, Appendix hereto, Proposed Additional Findings X and XI, pp. 33, 35, *et seq.*)

Claimant also requested the court to make an additional finding of fact to the effect that the Government

had not been prejudiced by the action of the claimant, during the period in question, in rendering its bills for the transportation involved at land-grant rates. Substantially the said request had been made in claimants original request for findings of fact. (See Stipulation, Appendix hereto, pp. 42, 47.)

Each of said requested additional findings of fact were overruled by the court (see Stipulation, p. 48 of this brief), which made no findings whatever upon the points covered thereby.

These requested findings of fact are properly before this court on this appeal under the following rule of this court governing appeals for the Court of Claims, adopted at its December Term, 1869 (9 Wall. VII):

> "RULE 5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer then such prayer and refusal shall be made a part of the record, certified on appeal, to this court."

Specifications of Error.

Error is assigned to the action of the Court of Claims in denying the petition, on the facts as found by the Court of Claims, and also to the action of the Court of Claims in overruling claimant's request for the additional and amended findings of fact set forth in the Stipulation between the parties.

ARGUMENT.

I.

Theory of Claimant's Case.

Paragraph V of Claimant's Amended Petition alleged (Rec., pp. 3-4) that—

> "Said Government bills of lading upon which the aforesaid shipments were made, and the conditions and instructions therein contained, embodied the well-established and long-continued practice of the United States and the common carriers by railroad in the United States, including claimant, by which shipments of freight by the Government over the railroads of the country (whether land-grant railroads or not) were accepted by the carriers without prepayment of the charges therefor * * * upon the understanding and agreement that, where no special rate was agreed upon, the service would be settled for, with the last carrier, upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance, as provided in the railroad land-grant Acts, and Army appropriation Acts of Congress so far as same were applicable, and the railroad Land-Grant Equalization Agreements, above referred to.
>
> "* * * that, in accordance with the well-established and long-continued custom and practice of the parties, settlement for such freight transportation by the United States is and has always been treated and regarded by the United States and by said common carriers by railroad, including claimant, as a matter of *accounting* merely between the parties and not as determina-

tive of the legal or contractual rights of the parties, or either of them, and that any error, either of fact or law, made by either of the parties in presenting or settling bills or vouchers for such freight transportation, if *against the United States*, was and is subject to correction by the Government at *any* time thereafter and the balance due the United States because of said error deductible from the amount due the carrier upon any subsequent bill or voucher before the accounting officers of the Government for settlement; and if the error were *against the railroad company*, the same might be corrected so long as settlement of the bill or voucher was within the control of the accounting officers of the Government, in view of certain statutory conditions and restrictions contained in 28th Statutes at Large, pages 205-211, but if control of the settlement had passed beyond the accounting officers of the Government, by reason of such statutory conditions and restrictions, the carrier was relegated to its suit in the Court of Claims to recover the balance due it for the transportation involved."

Claimant further alleged in its amended Petition (Rec., 4-5):

"* * * that in all such instances as are referred to herein, the compensation of the carrier was fixed by the aforesaid land-grant and Army Appropriation Acts and said Equalization Agreements, as well as by the aforesaid Government bills of lading upon which the shipments were made (in the absence of any agreement to pay special rates, as was the case here), at the published tariff or commercial rates of the carriers concerned, less land-grant deductions when, and

only when, authorized by said Acts and Agreements.

"* * * * that, as it is advised and believes its auditors and agents were led and constrained to render its bills and vouchers, as aforesaid for the transportation aforesaid, at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's department of the Army and upon *Government* bills of lading which in terms are only applicable to "Government property" and "public property", *and also (because) the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates,* * * * *.

"* * * that in rendering its bills or vouchers as aforesaid for said transportation of officers' personal property at tariff rates with land-grant deductions, and accepting payment on said basis, it did not waive nor did it intend to waive its right to payment in full for said transportation, nor was there any consideration for such a waiver, and claimant at all times intended to maintain and reserve its right to sue in this Court, if so advised, for the balances due it on account of said land-grant deductions, so far as the same were not barred by the statute of limitations, which right to sue it believed it was entitled to by law."

II.

The presentation of claimant's accounts for the transportation services involved at commercial rates less land-grant deductions, does not, under the circumstances of this case, estop it from suing for the balances lawfully due therefor in the Court of Claims within the six-year period of limitation.

The essential facts of this case are to be gathered, not only from the findings of fact made by the Court of Claims, but from its opinion in this case and the decisions of the Comptroller of the Treasury. This is so because the Court of Claims' findings of fact fail to cover the case fully, and its opinion indicates the existence of certain material facts not found, of which we believe judicial notice may be taken.

The claimant contended, and sought to show, in the court below, as the opinion of the Court of Claims indicates, that the attitude of the Government accounting officers in respect to this class of transportation, following the decisions of the Comptroller of the Treasury, was such, and had been for many years, that it was useless for it to present its accounts for the services in question at full commercial rates, and the Court of Claims finds this situation actually to have existed. Thus, in its opinion in this case, the Court of Claims, said (Rec., p. 23):

> "The first proposition [the understanding of the railroads, including claimant, that the Comptroller of the Treasury would hold this class of transportation subject to land-grant deduction] *may be conceded.* And, further, *it may be taken as settled,*

> irrespective of specific decision, that it was the view of all the Comptrollers that this class of transportation was subject to land-grant deductions, that wherever they have referred to the question they have so stated *and that that view of the law by them was well understood by everybody having to do with such matters.*"

Again, the Court of Claims in its opinion said (Rec., p. 25):

> "As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land grant rates, disallowing the excess, *and it was understood to be useless to appeal to the comptroller. True enough; and so far as payment was concerned the result would have been the same.*"

And in an earlier part of its opinion the Court of Claims said (Rec., p. 21):

> "Of course the different Comptrollers had always understood and applied that rule, *as was well understood.*"

It is important to note, in this connection, that Judge Downey, who delivered the opinion of the Court of Claims in this case, had himself been Comptroller of the Treasury before being appointed to the bench of that court and was Comptroller from May 16, 1913, to August 31, 1915, during which period a large part of the transportation involved herein occurred. He therefore speaks *ex cathedra.* In addition, when Comptroller he expressly recognized the rule referred to. (20 Comp. Dec. 575, 577, and 21 Comp. Dec. 482, 483.)

The first published decision of the Comptroller of the Treasury announcing this "well understood"

view and position of the Comptroller of the Treasury is apparently that of October 13, 1904 (11 Compt. Dec. 174), which contained this statement (ib., 175-6):

> "It has been recognized that an officer in the discharge of his duties requires a greater amount of personal belongings than that which the carriers will transport free on a regular ticket. Therefore the Army Regulations provide that the Government will transport at its expense for him a certain fixed amount, called a 'change of station allowance'—in this case 6,000 pounds. This can be done only on the theory that such baggage is necessary for the officer in the discharge of his duties. *The property so authorized becomes invested with a quasi public character, and as such the railroad is under obligation to transport it on the same terms as other Government property.*"

By statute the decisions of the Comptroller of the Treasury are made binding and conclusive upon the Executive Departments of the Government.

In this connection it is to be noted that, as found by the Court of Claims (Rec., p. 18, Finding of Fact IV), this question as to the applicability of land-grant rates to the class of transportation here involved did not become "of so much importance as it became after 1908 because until their bonded indebtedness was paid off the larger part of such transportation was over the bond-aided roads" (Rec., p. 18, Finding of Fact IX).

Prior to that date, and thereafter, according to the decision of the Comptroller of the Treasury of October 13, 1904, above cited, and the opinion of the Court of Claims in this case, it was well known to everybody concerned that it was useless to bill the Government for transportation of the personal belongings of an Army officer changing station at other

than land-grant rates. And the record distinctly shows that this was also the understanding of the attorney who represented claimant and the other Union Pacific lines as well as the Southern Pacific lines, at Washington, D. C., in the presentation and collection of the accounts of said railroads for Government transportation (Finding of Fact IX, Rec., 17-18).

It appears, therefore, from the opinion of the Court of Claims, that everybody concerned in these transactions, at the time these accounts were presented to the Government for payment knew that it would be *useless* for the carrier to present its bills for the transportation in question at full commercial rates, as the Comptroller would only allow, and the accounting and disbursing officers could only pay, land-grant rates therefor.

This being so, the claimant should not be held estopped to assert its claim to the balances lawfully due it for such services by suit in the Court of Claims within the period of limitations fixed by statute, no matter in estoppel being pleaded or shown and no element of accord and satisfaction being involved.

As a matter of fact the Court of Claims has itself repeatedly decided that, under such circumstances, the claimant is not estopped from suing in the Court of Claims for the balances due him.

Thus in *Pickley* v. *United States,* 46 Ct. Cl. 77, 91, where receipts had been given, the court said:

> "It is further contended by the Government that the receipts given by the claimant are an acquittance of any further demand under these contracts, and numerous authorities from our own courts are cited in support of this contention, and from an equal number from the same courts are

cited in opposition. It would serve no good purpose to enter into a discussion and analysis of these numerous cases and we shall not do so. *At the time these receipts were given there was no dispute between the parties as to the amount due the claimant; the Comptroller of the Treasury had decided that the amount received was all that was due, and the paymaster could pay no more, and the claimant knew this. Quite likely he was led to believe that no greater sum was due him, but if so, as we decide, he was mistaken. There was no settlement or accord and satisfaction between the parties, because there was nothing to settle and no difference between them to accord, and hence there could have been no consideration for receipting for a sum less than was actually due.*

"Under the authorities as we understand them we do not believe that the claimant is barred from recovering the balance which we find was honestly his due under the terms of the contract. (*Glavey* v. *United States*, 182 U. S. 595, 607-608; *Fire Insurance Association* v. *Wickham*, 141 U. S. 579; *Bostwick* v. *United States*, 94 U. S. 53; 12 Ct. Cls., 68; *Kiskadden* v. *United States*, 44 C. Cls., R. 205, 219; *Murdock* v. *United States*, 216 U. S. 494."

See also *Pennsylvania* v. *United States*, 36 Ct. Cl. 507, in which it was held, as stated in the headnote:

"Estoppel for failure to present a claim cannot be set up by the party whose officers decided that presentation was a useless procedure."

In that case the Court of Claims also pointed out that estoppel "cannot rest by mere silence upon a departmental rule adverse to jurisdiction, with no addi-

tional rights acquired by a claim and no injury done to the debtor in the meantime."

A case very similar to the one at bar is *Great Northern Ry. Co.* v. *United States*, 42 Ct. Cl. 234. That was a suit to recover deductions on account of land-grant made in the quarterly settlements of claimants accounts without question by the claimant for many years, upon the theory that a certain portion of the road was land-aided, when it was not, yet the Court of Claims held that it was entitled to recover the balances so deducted.

We quote the following from the opinion of the court in that case (42 Ct. Cl. 238):

> "For more than twenty years prior to the filing of the petition herein the plaintiff company, under contract with the United States through the Post-Office Department, carried the mails of the United States over its said leased lines of road, and settlements were made therefor quarterly with the Post-Office Department, in which settlements the Department treated the said line of road from University Switch to the Minneapolis Union Depot as a part of said land-grant road, and made the ordinary land-grant deductions for carrying the mails over that portion of the road, which amounted in the aggregate to $1,110.37, for the recovery of which the plaintiff instituted this suit.
>
> "The defendants concede that the plaintiff company has a 'just and meritorious claim for judgment' for the sum stated, unless it has lost its right to recover therefor by reason of its own laches 'and by reason of its failure to assert its rights at the proper time and in the proper manner.'

"The basis of the defendant's contention is set forth in the last finding, as follows:

" 'Prior to the time of filing the present claim and instituting the present suit, and for upwards of twenty years prior thereto, the claimant company made quarterly settlements with the Post-Office Department and received pay for the services rendered by said road in connection with the transportation of the United States Mail between the points involved, on the basis of land-grant for the entire distance between such points of St. Paul and Minneapolis; and at the time of said settlements receipted in full to the United States therefor, and at no time up to the filing of this claim before this court ever formally demanded of the Post-Office Department any additional compensation for said service.' "

The estoppel thus pleaded was disposed of by the court as follows (42 Ct. Cl. 239):

"The contention of the defendants, that the plaintiff company is estopped by its conduct in accepting the sums profferred by the Government in payment of its claim for mail service without a protest, needs but little comment. 'Estoppel in *pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' (Bigelow on Estoppel, 4th ed., 445; *Henshaw* v. *Bissell*, 18 Wall., 255; *Bryant* v. *Virginia Coal and Iron Company*, 93 U. S. R. 326.)

"It is needless to say that the record in this case contains nothing to show that the defendants were in any way misled to their injury by the conduct of the plaintiff. On the contrary, it appears that

by the change in the route, so as to pass partly over the non-land-grant line, the Government paid less than it would have paid over the continuous land-grant road. Hence no change of position could possibly have been induced by the conduct of the plaintiff to the detriment of the defendants.

"For these reasons the plaintiff is entitled to recover in the sum of $1,110.37, for which judgment is ordered to be entered."

It will be observed that in that case, as here, the claimant company had accepted payment of a less amount than was due it under its contract without protest, and that such practice had been long continued. *Moreover, in that case the company had given the Government a receipt in full for the transportation involved,* (which was not done in the case at bar). Yet the Court of Claims upheld the claim.

"Estoppels are not favored defences except when their technicality can be subordinated to equity." *Cape Ann Granite Co* v. *United States,* 20 Ct. Cl. 1.

The case at bar, like that above cited of the Great Northern Railway Company, also falls under the principle announced by this court in *Chicago and Northwestern Ry. Co.* v. *United States.,* 104 U. S. 680, that, where the right to a larger sum than was paid existed under the law and the contract between the parties, the acceptance of a smaller sum in settlement without protest is immaterial. In that case this court said (p. 686, italics ours):

"Of course, if it was not the intention of the act of Congress referred to, to affect the contracts

of the company, the erroneous interpretation of them by the Postmaster-General, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the Postmaster-General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; *and that whether it had protested against the erroneous construction of the law or not.* For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so, without prejudice to its lawful claim, *leaving the ultimate right to future and final decision.* It was not the case of a voluntary payment of an illegal exaction, wherein the maxim, *consensus tollit errorem*, prevents a recovery; because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria.* But here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either."

In the pending case the claimant company was equally bound, by law and its contracts, to carry the household goods and other personal property of Army officers and other Government officials, when offered them by the shipping Quartermasters of the Army, and it had a right to rely on the provisions of law and the terms of its contracts for the proper adjustment of its compensation, and was not pre-

cluded from claiming the full amount due for such transportation, under the law and its contracts, simply because it accepted payment of a less amount, without protest, from the disbursing officers or the accounting officers of the Government, especially when, as held by the Court of Claims, it would have been useless, so far as payment was concerned, for it to have presented its accounts for this transportation without land-grant deductions.

The *Railway Mail Service Cases* (13 Ct. Cl. 199; 103 U. S. 703), cited in the opinion of the Court of Claims in the *Baltimore & Ohio Railroad* case (52 Ct. Cl. 468), —a similar case to the one at bar and the opinion in which is relied upon by the court in this case—falls clearly within the principle of estoppel. Thus, in the opinion of this court affirming the judgment of the Court of Claims in that case, it is said (103 U. S. 704):

> "If the claimant, during all this time stood by contentedly *and saw the money which it now claims paid to the other company*, and received and receipted for the money paid it on that foundation, it would be inequitable to permit it now to recover, and thus make the government pay twice."

In the case at bar there was no contention on the part of the Government that it has been prejudiced by the attitude of the railroads. On the contrary, the Government has profited by the failure of the companies to sue earlier in the Court of Claims for full tariff rates, to the extent of the items that are barred by the statute of limitations and by the use by the Government of the amounts now claimed. Moreover, as above stated, appellant expressly requested a finding by the Court of Claims on the question of prejudice, but its request was overruled.

III.

Part Payment Alone did not Satisfy the Debt.

"Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release *under seal* or *no new consideration given.*"

1 Cyc. 319, citing in note many State cases and the following United States cases:

Fire Ins. Ass'n. v. *Wickham*, 141 U. S. 564.
United States v. *Bostwick*, 94 U. S. 53.
Murdock v. *Dist. of Col.*, 22 Ct. Cl. 464.
Baldwin's Case, 15 Ct. Cl. 297.
Latapee v. *Pecholier*, 2 Wash. (U. S.) 180, 14 Fed. Cas. No. 8,101.

"If payment of a less sum for a debt is not satisfaction, *although the creditor has agreed to accept it as such*, still less will it operate as satisfaction when he has not so agreed."
People v. *Hamilton County*, 56 Hun. (N. Y.) 459, 10 N. Y. Suppl. 88.

In *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577, this court said:

"The rule is well established that where the facts show clearly a certain sum to be due from one person to another, the release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover

> the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the large sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In *James B. Finney* v. *United States*, 32 Ct. Cl. 546, it was held that the acceptance by the claimant of the amount authorized to be paid him for certain flour furnished the Government, which was less than that rightfully due him under his contract, did not deprive him of his right to sue in this court, as contended by the Government, which relied on the Act of July 31, 1894, Sec. 8 (28 Stat. L. 207), providing that any person accepting payment under a settlement of an auditor of the Treasury Department "shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted," unless the acceptance by the claimant of a less sum than that claimed was by way of accord and satisfaction.

In disposing of this case the Court of Claims said (32 Ct. Cl. 554-5):

> "It is well-settled law that where a certain sum is due, payment of a part will not operate to satisfy the whole debt, even where a release of the entire sum is given, unless such payment be made and accepted upon some new consideration. (*United States* v. *Bostwick*, 94 U. S. 53, 67; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 577).

"And to constitute a new consideration it must be so regarded by both parties, and this was the view of the court in *Philpot* v. *Gruninger* (14 Wall. 570, 577), cited with approval in the case of *Fire Ins. Assn.* v. *Wickham*, (*supra*).

"In this latter case it is further stated that 'to constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one.'

"In respect of claims disputed by the Government, there is a class of cases holding in effect that, where a claimant voluntarily submits his claim for adjustment to the proper department or to a board appointed for that purpose, and the amount found due thereby is accepted and a receipt given therefor in full, that bars any further claim. (*United States* v. *Adams*, 7 Wall. 463, 479; *Mason* v. *United States*, 17 Wall. 67; *Murphy* v. *United States*, 104 U. S. 464).

"In the latter case, which was a claim for damages growing out of an alleged violation of a contract for excavating a pit for a dry dock, the court held that 'acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy in his adjustment of the account presented to him was equivalent to a final settlement and compromise of all the items of the present claim included in that account.'

"In the case at bar, however, the claim was not an unliquidated one, as the ascertainment of the amount due was a mere matter of computation, nor was it presented as a disputed claim, so far as it appears from the averments in the petition."

Such is the situation in these household goods cases, now before this court. There is no question here of accord and satisfaction. Claimants merely billed the

Government for what they understood the accounting officers would voluntarily pay, reserving their right to sue for the amount deducted on account of land-grant when they saw fit, which right was subject only to the statute limiting the period for suit in this court for the balances due on the respective bills of lading, and which bills of lading required payments at certain specific rates of charge, thus constituting liquidated claims against the United States.

IV.

The settlements referred to herein were simply matters of accounting and not of contract, and hence subject to subsequent correction and restatement by the carrier subject only to the limitations of time fixed by law.

The liability of the Government was fixed by the bills of lading, which constituted the contracts between the parties—not by the vouchers stating the amounts due. If a voucher were erroneously stated by the carrier, a supplemental bill could, under well-settled practice, be submitted to the Department concerned at any time prior or subsequent to the cashing of the check or warrant issued by the Government in payment thereof, except only that, in the case of a warrant issued in payment of an allowance authorized by an auditor of the Treasury Department, cashing thereof would preclude a further allowance by the accounting officers of the Treasury, in which latter event the carrier was relegated to suit in the Court of Claims for any balance due, and said suit was subject only to the statute of limitations and to any matter pleaded by way of estoppel or accord and satisfaction where those features existed.

Settlement by the Government's accounting officers of a carrier's claim for transportation, whether payment was accepted under protest or not, has never been held by this court (nor by the Court of Claims until recently) of itself sufficient to estop the carrier from recovering any balance due it by suit in the Court of Claims within the statutory period.

In further support of this view we refer to Claimant's Requests for Additional Findings of Fact XI and XII and Brief therein, which requests the Court of Claims overruled (see Stipulation hereto annexed, pp. 33, 35, *et seq.*, of this brief).

We also call attention to the several settlements of railroad accounts made by the Auditor for the War Department, set forth in support of these Requests (see Stipulation, Appendix, page 37, *et seq.*, of this brief).

Said settlements show that it is the practice of the accounting officers of the Government to reopen *settled* accounts with the railroads for transportation as occasion may arise, even though several years may have elapsed, and to deduct from any pending account of the carrier amounts that may have been overpaid it in settling such prior accounts.

It is manifest, therefore, that the accounting officers of the Government do not treat these settlements as final, but hold they are entitled to reopen a railroad's account for transportation rendered the Government whenever, in their judgment, it appears that an overpayment, *for any cause whatever*, has been made the railroad for any particular service, or a payment not warranted by law.

V.

An account stated or SETTLED is only prima facie evidence of the extent of the liability of the debtor, and may be impeached for fraud, omission or mistake IN LAW or fact.

In *Perkins* v. *Hart*, 11 Wheat. 237, 256, this court said:

> "The rule is the same in principle at law; a settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness or mistake *in law* or in fact; * * *."

In *Burrill* v. *Crossman*, 91 Fed. 543, the Circuit Court of Appeals for the Second Circuit, speaking by Judge Wallace, said (pp. 544-5):

> "* * * An account stated is a mere admission that the account is correct. If the party to whom it is rendered omits to communicate objections to the party rendering it within a reasonable time, an inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account thus rendered. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never precluded from giving evidence that the account did not include all the demands between them, unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties; as, for instance, where

> mutual compromises are made. *Lockwood* v. *Thorne,* 18 N. Y. 285; *Stenton* v. *Jerome,* 54 N. Y. 484. A stated and settled account is only *prima facie* evidence of its correctness. 'It may be impeached by proof of unfairness or mistake in law or in fact; and, if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it.' " *Perkins* v. *Hart,* 11 Wheat. 237.

In *Chicago, M. & St. P. Ry. Co.* v. *Clark,* 92 Fed. 968, the Circuit Court of Appeals for the Second Circuit, speaking by Judge Lacombe, held, as stated in the headnote:

> "A party to whom an account is rendered is not concluded by acquiescence therein, *or even by settlement in accordance therewith,* from proving the incorrectness of the account, *unless the statute of limitations has barred his right or the case is brought within the principle of an estoppel in pais* or of an obligatory agreement between the parties."

This case contains an extended review of the authorities bearing upon the conclusiveness of settled accounts.

And it is held that the rule as to the presumed accuracy of an account stated "*does not apply to the party who furnishes the account;* that as to him it is open to explanation for *any* omission or mistake."

> 1 Cyc. 370-371, notes 77, 78, 79.
> *Schettler* v. *Smith,* 34 N. Y. Super. Ct. 17.
> *Wilson* v. *Douse,* 140 Ill. 18; 29 N. E. 726.
> *Rayburn* v. *Mason Lumber Co.,* 57 Mich. 273; 23 N. W. 811.

VI.

The Rule as to Mistake of Law relied upon by the Court of Claims has no application here.

The rule as to mistake of law is usually invoked where a party seeks relief from some instrument he has executed, or from some payment that he has made, or from some action that he has taken, on the ground that he executed such instrument or paid such money or took such action while laboring under a mistake as to his legal rights in the premises. Such are *Bank* v. *Daniel*, 12 Pet. 32, and *United States* v. *Edmonston*, 181 U. S. 500, relied on by the Court of Claims. But such is not the case here. This claimant is not seeking to avoid the execution of a release or other instrument executed by it in favor of the Government, or any other action on its part purporting to release the Government from any further liability for the balances due it on account of the transportation involved, on the ground of a mistake of law as to its legal rights in the premises. No such release was ever given by it. The most it did was to certify that the accounts rendered by it were "correct and just, that the services had been rendered as stated; that payment therefor has not been received, and that the rates charged were not in excess of the lowest net rates available for the Government based on tariffs effective at the time" (See Form of Certificate to Public Voucher, &c., p. 13), all of which were true, as far as it went.

The situation here is that *the Government* is endeavoring to avoid responsibility for the balances due claimant under this plea of mistake of law, having set up, by way of defense to this suit, that the claimant

rendered its bills for less than the full amount due it by mistake as to its full legal rights in the premises. This claimant denies, and there is no finding by the court to any such effect. On the contrary, the fair presumption from what the Court of Claims said in its opinion, and from the allegations of the petition, is that claimant was not laboring under any mistake as to its legal rights, but merely rendered its bills at land-grant rates because it knew the disbursing and accounting officers of the Government, following the Comptroller's views and decisions would not pay full commercial rates therefor, although in some instances, and probably at first, it or some of its officers might not have known that the property shipped was not Government property, which would be a mistake of fact.

But even if claimant had been laboring under a mistake as to whether the Government was entitled to land-grant rates on this class of transportation, that fact would not preclude it from recovering any balances due, since the debt owing it by the Government was not entirely extinguished by part payment only. Claimant would be entitled to recover the balances due by suit in the Court of Claims within the statutory period, unless the failure of the claimant to claim the full amount in the first instance can be said to have so prejudiced the Government as to make it unjust and inequitable for the claimant to maintain a suit for the balances, which it is clear from this record is not the case here, no matter in estoppel being pleaded or proved.

Perkins v. *Hart*, 11 Wheat. 237, 256.
Pickley v. *United States*, 46 Ct. Cl. 77, and other authorities above cited.

Even where applicable the rule as to mistake of law is not favored:

> "The rule that money paid under a mistake of law cannot be recovered back often acts partially and inequitably and is regarded with so much disfavor by the courts that it will not be extended beyond the limits defined for the scope of its operation. The tendency of the courts is to treat mistakes as to legal rights as mistakes of fact or mistakes of mixed facts and law, wherever it is possible to do so without disturbing well settled precedents."
>
> *Ward* v. *Ward*, 12 Ohio Civ. Dec. 59; 30 Cyc. 1314.

Utermehle v. *Norment*, 197 U. S. 40, 56, cited by the Court of Claims in support of its theory that the rule as to mistake of law applied to the case at bar, was in fact a case where the party seeking the relief was held to be estopped from making a claim to a decedent's estate because he had accepted benefits under the will.

In *Central Pacific R. R. Co.* v. *United States*, 28 Ct. Cl. 427; affirmed 164 U. S. 93, also relied on by the Court of Claims, the Post Office Regulations expressly required that the department's inspectors be transported free by railroads contracting to carry the mails, and the acquiescence by the carriers in that continuing demand was held to estop it from subsequently claiming compensation for transportation services so rendered. But in the case at bar the contract between the carrier and the Government provided that the carrier should be paid *tariff rates* for the transportation involved, subject only to deductions on account of land-grant distance involved, when the transportation was

of *public property*, which this transportation admittedly was not; furthermore, no demand is shown to have been made by the agents of the Government shipping this property that the carrier transport the same at land-grant rates, and there was no such demand.

VII.

No Estoppel by Reason of the Provisions in the Army Appropriation Acts.

The further suggestion in the opinion of the Court of Claims in the *Baltimore & Ohio Railroad* case that claimant was estopped by the provisions in the several Army Appropriation Acts to the effect that payment thereunder, at the reduced rates therein named for Government transportation over land-grant roads (fifty per cent. of the rates paid private parties for similar transportation) should be accepted as in full for all demands for such service, is met by the fact that the restrictions in those Acts have no reference to anything other than the transportation of *troops and property of the United States*. (See Finding of Fact III, Rec., p. 7. See also, 25 Comp. Dec. 520-523, where the Railroad Land Grant Acts and Army Appropriation Acts are reviewed, and the established practice stated.)

Manifestly, in order for a land-grant road to be estopped by receipt of payment, under said Acts, of less than the full commercial rate, the transportation must fall within one of the classes of transportation named therein. And equally clear is it that the household goods and other personal property of Army officers or other Government officials is not property of

the United States. Besides, this suggestion of the Court of Claims is met by its action in giving judgment for the claimants in cases of this kind where express protest against land-grant deductions is shown. Protest would avail nothing if the provision in the Army Appropriation Acts referred to were applicable and controlling.

Under the Railroad Land-Grant Acts neither Congress nor the Comptroller of the Treasury is authorized to require the railroads to transport, at such reduced rates, persons who may be *potentially* troops of the United States, or who have ceased to be troops of the United States, such as applicants for enlistment in the Army, discharged soldiers, etc., although the United States has an interest in such transportation and may pay the expense thereof (*Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354, affirming 52 Ct. Cl. 226). By the same reasoning said Acts cannot be held to authorize either Congress or the Comptroller of the Treasury to require the railroads to transport *private* property of officers of the Government at reduced rates, on the theory that the Government has some interest in the movement and thereby such property is imbued with a *quasi* public character.

And so the Court of Claims held, when this question came before it, as shown by the following quotation from its opinion in this case (Rec., p. 19):

> "The question as to the applicability of land-grant rates to this class of transportation may be regarded as settled *adversely* [to the Government] by the *Chicago, Milwaukee & St. Paul Ry. Co.* case decided by this court February 8, 1915."

No appeal was taken by the United States in that case.

Notwithstanding the opinion of the Court of Claims in said case of the *Chicago, Milwaukee & St. Paul Ry. Co.*, the Comptroller of the Treasury subsequently held that he was precluded by the restrictive provisions in the annual Army Appropriation Acts from paying for the transportation of officers' personal property and effects at other than the rates applicable to the transportation of Government property (Decision of Comptroller of Treasury of December 14, 1915, 22 Comp. Dec. 263, adhered to in his decision of June 30, 1915). Whereupon Congress, in the Army Appropriation Act approved August 29, 1916 (39 Stat. 619, 634), added the following proviso after the usual restrictive provisions as to the payment for Army transportation over land-grant roads:

> "*And provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

A similar proviso has been contained in all subsequent Army Appropriation Acts (40 Stat. 54; ib. 477). And since these provisos were added the Comptroller has been paying for the transportation of household goods and other personal property at full commercial rates.

This action of Congress should be taken as declaratory of the original meaning of these restrictions in the Army Appropriation Acts. Surely Congress never intended that said restrictive provisions should pre-

clude the disbursing and accounting officers of the Government from paying the land-grant railroads in full for transportation which did not come within the scope of deductions provided for in the land-grant Acts.

VIII.

Officers' Private Mounts.

The transportation of officers' private mounts, involved in this case, amounting to $204.59 (Rec., p. 15, Finding of Fact VII) was *the authorized statutory change of station allowance* (Rec., p. 8, Finding of Fact IV), hence the decision of the Court of Claims in *Illinois Central Railroad Co.* v. *United States*, 52 Ct. Cl. 53, has no application.

In that case the Court of Claims held that the Secretary of War could not, by departmental regulation, authorize the transportation, upon Government bills of lading, *to the homes of said officers*, of the authorized mounts of said officers, *when said officers were ordered abroad*—something which it held was not provided for by Congress; and this being so it held there was no authority to require the Government to pay for *such* transportation.

The judgment of the Court of Claims should therefore be reversed, and the case remanded with instructions to enter judgment for the appellant.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Appellant.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad and Navigation Company, Appellant, vs. The United States.	On Appeal from the Court of Claims.

STIPULATION.

(Filed November 15, 1920.)

It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that the following and annexed copies of the Motion of the Oregon-Washington Railroad and Navigation Company in the Court of Claims for Amended and Additional Findings of Fact and Brief thereon, filed May 20, 1919, and the Order of the Court of Claims entered June 2, 1919, overruling said Motion, may be taken and considered as a part of the transcript of record in the Court of Claims of this case for the purposes of this appeal.

William R. Hare,
Attorney for Oregon-Washington R. R. & Nav. Co.

Wm. L. Frierson,
Solicitor General.

Frank Davis, Jr.,
Asst. Atty. General.

COURT OF CLAIMS.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, vs. THE UNITED STATES.	No. 33183.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed (paged from 1 to 12 inc.) are true copies (1) of the claimant's motion for amended and additional findings of fact, and brief thereon, filed May 20, 1919; and (2) of the order of the court, entered June 2, 1919, overruling said motion as the same remain and appear upon the files and of record in this court in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Thirteenth day of October A. D., 1920.

[Seal.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

COURT OF CLAIMS OF THE UNITED STATES.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, CLAIMANT, vs. UNITED STATES.	No. 33182.

MOTION FOR AMENDED AND ADDITIONAL FINDINGS OF FACT, AND BRIEF THEREON.

Now comes the claimant, by its attorneys, and prays the Court to amend its Findings of Fact herein announced May 5, 1919, in the following particulars:

Proposed Amendment to Finding of Fact VI.

Claimant respectfully asks the court to amend the last paragraph of Finding of Fact VI so as to make said paragraph read as follows (new matter italic):

> For the transportation here involved and for like transportation theretofore, claims for which were stated in the same way, the plaintiff company and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books the net amounts determined as above stated and claimed in its vouchers and no more, and upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded by the auditing department of the company as closed, *so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect.*

Proposed Additional Finding of Fact X.

Claimant respectfully requests the following additional Finding of Fact:

The testimony shows that the accounts between the railroads and the Government for Government transportation are considered, by both the Government and the carriers, as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts. This practice appears to have grown out of the practice by which the railroads transported persons and property for the Government, without prepayment of the charges therefor, upon the form of Government bill of lading prescribed by the Treasury Department, and upon the conditions likewise prescribed by the Treasury Department and set forth therein. The obligation of the Government to pay said charges being fixed by law or the contract for the transportation (in case of freight, the bill of lading) or both, it was understood by the carriers as well as by the accounting officers of the Government that no settlement was final if not in accordance with the law and the contract, as well as the facts, so that if an overpayment were made it could be corrected at any time by the accounting officers of the Government and deducted from a subsequent settlement with the carrier. If an under-payment were made in a settlement by an Auditor of the Treasury Department, the carrier would have its remedy before the Department, subject to certain conditions prescribed in the Dockery Act of July 31, 1894, and failing in securing his remedy there, it might bring suit in the Court of Claims within the time limited by law, or it might sue in the Court of Claims without first applying to the Department. In the matter of any underpayment made by a disbursing officer of the Government, the carrier might either present a claim to the proper Auditor of the Treasury Department, or sue in the Court of Claims.

Chas. H. Bates, Q. 51-59, 63, Evidence, pp. 42-45, 55-60.

Auditors for Claimant Companies, Evidence, pp. 22, 23, 27, 65-66, 72, 74-75, 81, 83, 92, 107.

Proposed Additional Finding of Fact XI.

Claimant respectfully requests the following additional finding of fact:

At the trial of this case in support of the testimony of the Auditors for the several companies embraced in the Union Pacific System and the Southern Pacific Lines, and the testimony of the legal representative of said companies at Washington, D. C., to the effect, as stated in the preceding finding, that the accounts between the Government and the railroads, including claimant were in the nature of running accounts, subject to correction, as the occasion arose, at a later date, under the rules prescribed by law, claimant offered in evidence copies of the following documents showing corrections made by the Treasury Department in prior settlements with certain railroads which settlements had been accepted by said railroads. **(Evidence, pp. 56-60.)**

(Copy.)

NOTICE OF ALLOWANCE OF CLAIM.

Claim No. 170490.

Treasury Department,
Office of the Auditor for the War Department,
Washington, D. C., May 18, 1914.

CHAS. H. BATES, *Atty.*,
Washington, D. C.

The claim of the Galveston, Harrisburg and San Antonio Ry. Co. for freight service in October, 1913, bill No. Q 894, received in this office May 11, 1914, has been allowed, as shown in the following statement, and settlement certificate, No. 21176, dated May 18, 1914, has this day been forwarded to the Secretary of the Treasury for payment.

Amount claimed	$1,863.61
Deducted per statement herewith	1,859.88
As settled	3.73

Respectfully,

J. L. BAITY,
Auditor.

(Copy.)

STATEMENT OF DIFFERENCES.

Arising in the claim of the Galveston, Harrisburg & San Antonio Railway Company for freight service in October, 1913. Bill No. Q-894; claim 170490.

Claimed	$1,863.61
Deducted	1,859.88
Allowed	3.75

Freight charges on B/L 604 is allowed as claimed.

The deduction is on account of overpayment by Capt. E. W. Tanner on his voucher 343-B, July 1913, F. Y. 1913, as follows: B/L 92, Feb. 25, 1913, Ft. Sheridan, Ill., to Texas City, Texas, for nine (9) carloads horses, ten carloads wagons, and one carload feed, on which payment was made on basis of gross rates without deduction account of land-grant equalization, in the sum of $4,395.68. On basis of equalization via Chicago and Cairo payment should not have exceeded $2,535.80.

This movement was by mixed train, hence was not a passenger train any more than it was a freight train. The large number of passengers (requiring 5 baggage and 8 sleeping cars) and large quantity of freight (including 20 carloads horses, wagons, and feed on B/L. #92), moving from one point to a single destination—too great to permit all being handled in a regular train. It would therefore appear that movement in a separate train was as much for the convenience of the carriers as for the Government. See decision of the Comptroller of the Treasury, August 21, 1913 (Appeal 22433), Jany. 15, 1914, Appeal 23092 and Jany. 14, 1914 (Appeal 23005).

Disallowed, $1,859.88.

Treasury Department, Office of Auditor for the War Department, May 18, 1914. 21176.

(Copy.)

NOTICE OF ALLOWANCE OF CLAIM.

Claim No. 156590.
File No. ——.

Treasury Department,
Office of the Auditor for the War Department,
Washington, D. C., May 5, 1908.

To CHARLES H. BATES, *Atty.*,
Washington, D. C.

The claim of the Southern Pacific Co. for passenger service in August, 1907, bill P 3897 received in this office April 6, 1908, has been allowed as shown in the following statement, and settlement certificate No. —— has this day been forwarded to the Secretary of the Treasury for payment.

Amount claimed	$4,819.00
As settled:	
Ctf. #4319—Cash	$1,294.05
Ctf. #4320—B. A.	223.12
Disallowed as per statement herewith	3,301.83
	4,819.00

Respectfully,

B. F. HARPER, *Auditor.*

(Copy.)

STATEMENT OF DIFFERENCES.

Southern Pacific Co.'s bill No. P 3897.

Amount claimed	4,819.00
Amount allowed	4,819.00
Cash, $4,595.88; B. A., $223.12.	
From the cash amount	4,595.88
Deduct	3,301.83
Leaving amount payable	1,294.05

The deduction of $3,301.83 is due to overpayment December 5, 1905, per Sett. No. 30800, Southern Pacific Company's bill No. P 115, on the following transportation requests:

Date	No.	From—	To—	No men.	Rate.	Total amount.
July 6, 1904	490498	Ashland....	Portland....	54	$10.30	$556.20
" " "	490499	Roseburg...	"	51	6.00	306.00
" 7 "	490486	Salem.....	"	58	1.65	95.70
" " "	490491	Eugene.....	"	1	.....	3.75
" " "	490495	Albany.....	"	1	.....	2.45
" " "	490497	Eugene.....	"	99	3.75	371.25
" 8 "	490502	Albany.....	"	55	2.45	134.75
" 18 "	490485	Woodburn..	"	52	.90	46.80
" 19 "	490640	Portland....	Eugene.....	96	3.75	360.00
" " "	490641	"	Ashland.....	51	10.30	525.30
" " "	490642	"	Roseburg....	51	6.00	306.00
" " "	490658	"	Eugene.....	1	3.75	3.75
" 20 "	490687	"	Woodburn...	57	.90	51.30
" " "	490680	"	Albany.....	59	2.45	144.55
" " "	490689	"	Salem.....	58	1.65	96.70
" 27 "	490692	"	Woodburn...	1	.....	.90
" 30 "	50127	"	Eugene.....	1	.....	3.75
" 30 "	50122	"	Albany.....	1	.....	2.45
" " "	50125	"	"	1	.....	2.45
" " "	50129	"	Eugene.....	1	.....	3.75
" 20 "	490484	Albany.....	Portland....	61	.....	149.45
	490694	Portland....	Lebanon....	..	(See below)	135.5
		Total..	.....	..	.....	3,301.83

The above service was furnished by the Southern Pacific Company over its free land-grant road, and no payment should have been made except on Req. No. 490694, 56 tickets, Portland to Lebanon at $2.75, amounts to $154.00, subject to 88.04% free land grant obtained on the following mileage:

(Copy.)

"E. G. 102.

Treasury Department,
Office of the Auditor for the War Department,
Washington, December 14, 1899.

D. A. CHAMBERS, *Atty.*,
Southern Pacific Co.,
908 G Street NW., Washington, D. C.

SIR: You are hereby informed that there has been a charge raised against the Southern Pacific Co., by settlement certificate No. 9184, for the amount of $1,272.25, this charge being on account of payments made to said company by the governor of the State of Oregon for the transportation of volunteers for the United States Army from Ashland and intermediate points to Portland Oregon, in April and May, 1898, said payments having been reimbursed to the governor of Oregon by settlement certificate No. 8631, dated November 2, 1899, under acts of July 8, 1898, and March 3, 1899.

The railroad over which this transportation service was rendered is one which under section 5, act of July 25, 1866 (14 Stat., 239), the property and troops of the United States are to be transported at the cost, charge, and expense of the corporation or company owning or operating the same. A copy of the bill on which this charge is based is enclosed herewith, the transportation being wholly over a free land-grant road, with the exception of the item for transportation for McMinnville to Portland.

The amount of this charge should be deposited with the Treasurer of the United States, to the credit of the appropriation: "Reimbursement to States and Territories for expenses in raising troops for war with Spain."

Respectfully,

F. H. MORRIS,
Auditor.

M. N. M. 12."

(The enclosure is as follows:)

STATE OF OREGON.

"No.....2. G. 9 A.

To Southern Pacific Company (Pacific system).

For transportation of State troops as per transportation requests signed by B. B. Tuttle, Q. M. Gen., O. N. G., attached, at charter car rates:

Received payment.

C. H. MARKHAM,
G. F. & C. A.

No. 147, Roseburg	to	Portland,	43	men	----------	$227.70
148, Salem	"	"	63	"	----------	64.10
149, Eugene	"	"	61	"	----------	143.85
150, Ashland	"	"	39	"	----------	323.95
151, Hubbard	"	"	18	"	----------	36.80
152, Albany	"	"	55	"	----------	92.00
153, Woodburn	"	"	21	"	----------	41.40

(Copy.)

"E. G. 102.

Treasury Department,
Office of the Auditor for the War Department,
Washington, December 14, 1899.

D. A. CHAMBERS, *Atty.,*
Southern Pacific Co.,
908 G Street, NW., Washington, D. C.

SIR: You are hereby informed that there has been a charge raised against the Southern Pacific Co., by settlement certificate No. 9184, for the amount of $1,272.25, this charge being on account of payments made to said company by the governor of the State of Oregon.

(Chas. H. Bates, Q. 51-59: Evidence, pp. 42-45, 55-60; Auditors for claimant companies: Evidence, pp. 22, 23, 27, 65-66, 72, 74-75, 81, 83, 92, 107.)

Proposed Additional Finding of Fact XII.

Claimant respectfully requests the following additional finding of fact:

It does not appear that the Government was put to any disadvantage or loss, so far as the transportation involved herein is concerned, by reason of the acquiescence of the claimant, as aforesaid, in the ruling of the Comptroller of the Treasury that such transportation was entitled to land-grant rates, or by the practice of the claimant in rendering its bills for the transportation involved herein at land-grant rates.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Claimant.

BRIEF IN SUPPORT OF REQUESTS FOR AMENDED AND ADDITIONAL FINDINGS OF FACT.

I.

As to Proposed Additional Findings X and XI and Proposed Amendment of Finding VI.

Proposed Finding X is the same as Finding XIX of Claimant's original Requests for Findings of Fact. The point that the accounts of the railroads with the United States for Government transportation are in the nature of running accounts, subject to correction at a later date in the manner stated in said proposed finding, is not covered at all in the Findings of Fact rendered by the court in this case. The finding requested is fully sustained by the evidence, references to which are given above.

This particular finding is regarded as of vital importance to the claimant's case. The court's attention is directed to the fact that the amended petition is expressly drafted upon the theory that these accounts between the carrier and the Government for Government transportation are in the nature of running accounts, and that the matter involved here is simply one of accounting. Claimant feels that it is entitled to the finding requested, upon the showing made and that this case cannot be satisfactorily determined by the Supreme Court, upon the appeal which claimant intends to take, unless that Court is advised as to the practice referred to in said proposed finding.

In this connection the attention of the Court is also respectfully called to the fact that in Finding VI of this court, p. 9 of Finding of Fact, the court has found that—

> "Upon payment of an amount thus claimed and charged as to any shipment the transaction was regarded as (quoting the language of the company's auditor), 'behind us.' "

This expression is also quoted in the court's opinion in this case.

We do not think it fair to the claimant to leave the findings in this state. While the Auditor for the Company testified as quoted by the court, he also testified as follows (Evidence, p. 27):

> 22. Question. The work that is done under your direction and jurisdiction in connection with these matters, is that accounting in its character, and exclusively accounting?
>
> Answer. Oh, entirely so.
>
> 23. Question. Can you state whether in rendering these accounts against the Government you treat the transactions as closed, or are they subject to subsequent adjustment?
>
> Answer. Well, they are subject to subsequent adjustment. They are being reopened and readjusted right straight along. They always have been. If the Government was dissatisfied with the settlement that it had made, why, it would reopen it and take the money out of some subsequent payment. There wasn't anything particularly final about it.

The testimony of the auditors for the other claimant companies embraced in the Volume of Evidence in this case is to the same effect as that just quoted.

(Evidence, pp. 65-66, 72, 74-75, 81, 83, 92, 107.)

On this point, Mr. Skinner, Traffic Manager of the claimant company, testified (Evidence, pp. 22):

> 14. Question. And in those days did you treat these transactions as subject to adjustment?
>
> Answer. Well, yes; they were continually the subject of adjustment and of controversy. But notwithstanding that, we made our statements from month to month to make our current statements, but they were always subject to adjustment, and as I say, even sometimes came back—I don't think I am exaggerating at all when I say the accounts came back as long as 2 years after their preparation for the correction of 1 cent.

Mr. Bates also testified to the same effect (Evidence, pp. 42-45), and in that connection offered in evidence the several settlements by the Auditor for the War Department now asked to be included in additional Finding XI.

The testimony of the auditor for the company also shows that he did not intend to be understood, when saying that he regarded a transaction of the character referred to therein as "behind us" (i. e., the auditing department) that thereby the company was precluded from questioning the same in the courts, as Finding VI of this court suggests. On this point the auditor for the company said (Evidence, pp. 27-28):

> 24. Question. Did you ever attempt, Mr. Blaisdell, yourself, to determine the legal rights of the Oregon-Washington Railroad & Navigation Co. in connection with settlements of these accounts?
>
> Answer. No; no.
>
> 25. Question. Did you understand, at any time, that you had resolved the matter to a situation where the legal rights of the company had been definitely determined?
>
> Answer. No; I could not do that.
>
> 26. Question. Who would do that, if that were undertaken or done?
>
> Answer. Well, the legal branch of the service would, either our people here or our attorneys in Washington. At the present time Mr. Bates is our representative there. Earlier it was Mr. Chambers. Most of the hard problems were put up to Washington. The little ones, I think, were decided here. But as a rule most of the questions went to Washington, because we did realize that uniformity in these decisions was much to be desired and we didn't want to start out and do something differently from what the other railroads of the United States were doing.
>
> 27. Question. At any time while these accounts were handled under your jurisdiction, did you treat the transactions as closed and ultimately disposed of?
>
> Answer. I don't know that I thought very much about that feature of it, Mr. Hallock. We got the amount of money that the Government was willing to pay us and we took that and entered it on the books and called the

transaction behind us, just accepting more or less under mental protest the settlement.

28. Question. Do you know whether, during those times, you had recourse to any tribunals or authorities for a final adjustment of any disputed accounts?

Answer. Do you mean, did I actually have the recourse or the right of recourse?

29. Question. What I am attempting to determine, Mr. Blaisdell, is this: At any time did you understand that your rights were determined absolutely by the rendition of these bills, or did you understand that you had any further recourse in the event that there was any dispute or misunderstanding as to the correct amounts?

Answer. Oh, I always understood I had further recourse. I was simply getting the money that the Government was willing to pay.

30. Question. And in making these settlements and adjustments did you intend, at any time, to waive any rights or remedies that you might have, or that the carrier might have in the matter?

Answer. No; I would not do that. I didn't give much consideration to that feature of it, but on the broad general ground I would never do a thing of that kind.

We submit, therefore, that Finding VI is very misleading and should be made as above requested, also that additional Findings X and XI should be made as above requested.

II.

Proposed Finding XII.

This proposed Finding is to the effect that the Government was not prejudiced by the acquiescence of the claimant company in the holding of the Comptroller that transportation of this character was entitled to land-grant rates, or in the practice of the claimant company in rendering its bills, for the transportation involved in this suit, at net land-grant rates.

We regard a finding of this fact also as of vital importance. There is no claim of prejudice in this case by the Government

and no loss or material disadvantage to the Government has been attempted to be shown. And we believe the practice of the Government since the decision of this court in the case of the Chicago, Milwaukee & St. Paul Railway Company shows that it was not prejudiced by the acquiescence of claimant in said land-grant deductions, as we understand that the Government has been paying full rates for shipments of this character it has been routing these shipments just the same as it did before, and has treated the matter, since that decision, simply as one of accounting.

On this point Mr. Bates testified (Evidence, pp. 46-47):

> 62. Question. Was the Government put to any disadvantage or loss by reason of the claimants in this and the other cases above referred to failing to assert their claims to full commercial rates for the transportation of household goods and other personal property of Army officers and other Government officials, referred to, in the several petitions therein, at an earlier date?
>
> Answer. No; because all shipments were made on the same form of bill of lading, constituting the contract of carriage. The tariffs of all the railroads, where the roads were in competition with each other, named the same rates of carriage, and either of the competing roads might have been used, but the contract would have been the same, owing to the land-grant equalizing agreements. Thus the through tariff rates from Chicago to San Francisco were the same both via the Union Pacific route via Ogden and the Santa Fe route via Albuquerque, and the equalization agreements of the Union Pacific route would require that they shall accept the same net rates as could be lawfully established via the Atchison, Topeka & Santa Fe system after proper land-grant deductions were made. Therefore, the cost to the Government would be the same no matter which route was used—a land-grant route or a nonland-grant route, a longer or a shorter land-grant route. Nor could the Government be at any disadvantage, of course, where only one route was available.

In opposing substantially the same request in Finding XX of our original Requests for Findings of Fact, counsel for

the Government failed to point out any way in which the Government might have been prejudiced by the practice referred to.

In this connection it should be noted that, instead of being prejudiced, the Government, on the contrary, has *profited* by the acquiescence of claimant and other carriers in the rulings of the Comptroller, to the extent that the additional amounts that might have been claimed for said transportation have been barred by the statute of limitations.

Respectfully submitted,

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In this case it is ordered that claimant's motion for amended and additional findings be overruled.

BY THE COURT.

June 2, 1919.